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Nos. 96-1034 and 96-1108

In the Supreme Court of the United States

OCTOBER TERM, 1996

PLAYBOY ENTERTAINMENT GROUP, INC., APPELLANT
v.
UNITED STATES OF AMERICA, ET AL.

SPICE ENTERTAINMENT COMPANIES, INC., APPELLANT
v.
JANET RENO, ATTORNEY GENERAL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
STEPHEN W. PRESTON
Deputy Assistant Attorney General
JAMES A. FELDMAN
Assistant to the Solicitor General
BARBARA L. HERWIG
EDWARD HIMMELFARB
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

WILLIAM E. KENNARD
General Counsel
CHRISTOPHER J. WRIGHT
Deputy General Counsel
Federal Communications Commission
Washington, D.C. 20544

QUESTION PRESENTED

Section 505 of the Communications Decency Act of 1996, Pub. L. No. 104-104, Tit. V, § 505, 110 Stat. 136 (1996), requires that a cable television operator "providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming" either "fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber * * * does not receive it," or, alternatively, not provide that programming "during the hours of the day (as determined by the [Federal Communications] Commission) when a significant number of children are likely to view it."

The question presented is whether the district court abused its discretion in refusing to grant appellants a preliminary injunction precluding implementation and enforcement of Section 505.

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v.

UNITED STATES OF AMERICA, ET AL.

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OPINIONS BELOW

The opinion of the district court denying a preliminary injunction (J.S. App. 1a-40a)[1] is reported at 945 F. Supp. 772. A previous opinion of the district court

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[1] References to "J.S. App." are to the Appendix to the Jurisdictional Statement in No. 96-1034.

granting a temporary restraining order is reported at 918 F. Supp. 813.

JURISDICTION

The order of the district court denying a preliminary injunction was entered on November 8, 1996. The notice of appeal in No. 96-1034 was filed on November 8, 1996. The notice of appeal in No. 96-1108 was filed on November 12, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

Appellants are firms that provide "virtually 100% sexually explicit" programming (J.S. App. 8a) for transmission by cable operators (also referred to as "multisystem operators" or "MSOs") to premium subscribers who seek such programming. They sought a preliminary injunction, as well as permanent declaratory and injunctive relief, against the implementation and enforcement of Section 505 of the Communications Decency Act of 1996, Pub. L. No. 104-104, Tit. V, 110 Stat. 136. That statute requires cable operators carrying cable channels "primarily dedicated to sexually-oriented programming," *ibid.*, to take steps to ensure that those who do *not* subscribe to those channels will not receive intelligible audio or video signals from those channels at a time when children are likely to be viewing. The cable operator either must make intelligible audio and video signals from those channels generally unavailable to nonsubscribers, or the operator must broadcast the channels only at times of day when significant numbers of children are unlikely to be viewing. Appellants have taken these appeals from the district court's refusal to grant them a preliminary injunction against implementation or enforcement of the statute.

1. Approximately 62 million households nationwide receive cable television. J.S. App. 12a. Cable subscribers typically are offered a "basic" package of channels for a monthly fee, but they also may subscribe at an additional monthly fee to "premium" channels that provide sports programming, recently released movies, or sexually explicit adult entertainment. *Id.* at 7a. Cable subscribers may also order premium programming on a pay-per-view basis, permitting the subscriber access to a particular movie or sporting event for a specified additional fee. *Ibid.*

To ensure that subscribers who have not paid for premium programming are not able to view it, most cable operators "scramble" the programming at their central transmission facility (the "headend"), using either "RF" or "baseband" technology. Such scrambling may render the video portion of the picture completely unintelligible to those who do not subscribe to the premium programming, or it may merely make the picture jump and roll, while leaving images on the screen discernible. The cable operator provides subscribers who are authorized to receive the premium channel a set-top device, called a converter (or converter/descrambler), which is connected between the subscriber line and the television set to counteract the scrambling and permit clear reception of the channel. RF scrambling does not affect the audio portion of the signal. As a result, the audio portion can be heard on all subscribers' television sets at all times. J.S. App. 8a-9a & nn. 11-12. Modern baseband scrambling may make the audio signal unintelligible, but prior generations of baseband scrambling may leave it unimpaired. Kramer Decl., ¶¶ 15, 23-25, 43-44; Jackson Decl., ¶¶ 21-22.

The limitations of these scrambling systems give rise to what is known as "video and audio bleed" or simply

"signal bleed." In any system where premium programming is carried, all subscribers receive the scrambled signal of each premium channel. As a result, insofar as the video or audio signal of a premium channel is not completely scrambled, those who do not subscribe to the channel will be able to receive some or all of the video or audio signal. That is true not only for subscribers who have cable-ready televisions that can be directly connected to the subscriber line, but also for subscribers whose televisions are connected by set-top converters (other than sets connected to "mapping" converters that completely block both audio and video signals from channels to which the homeowner does not subscribe). J.S. App. 10a-11a. Signal bleed is a particular problem with sexually explicit adult programming, because it allows some or all of the video and audio to be seen and heard on the televisions of tens of millions of cable subscribers who do not subscribe to such programming and is, therefore, available to their children. *Id.* at 11a-12a.

2. When Congress enacted Section 505, it was "aware that some cable systems [were] permitting 'adult' programs that [were] clearly unsuitable for children to be received in the home without sufficient scrambling." S. Rep. No. 367, 103d Cong., 2d Sess. 103 (1994). As Senator Feinstein, one of the sponsors of Section 505, commented, "[p]arents * * * come home after work only to find their children * * * watching or listening to the adult's-only channel, a channel that many parents did not even know existed." 141 Cong. Rec. S8167 (daily ed. June 12, 1995). As an example, she referred to the fact that a "partially scrambled pornography signal was broadcast only one channel away from a network broadcasting cartoons and was easily accessible for children to view." *Ibid.*

Congress's concerns were triggered by complaints from across the country. For example, Mr. Anthony Snesko had made 550 copies of a videotape showing the Spice Channel—one of the channels operated by appellant in No. 96-1108—as it appeared on his television at 9:00 a.m. in the morning sometime in April or May, 1994, and had distributed a copy to every member of the House and Senate. Snesko Decl., ¶ 12.[2] In December 1995, a mother from Cape Coral, Florida, complained to her congressman that she had recently found her eight-year-old son, seven-year-old daughter, and a playmate watching Spice at 4:00 in the afternoon, "transfixed" by scenes of "a naked man sodomizing a woman" together with the "groans and epithets that go along." DX 14.[3] In 1993, Senator Biden urged the Federal Communications Commission to review a cable company's compliance with federal law after large numbers of Delaware residents voiced objections about unwanted reception of Spice. DX 31. See also, *e.g.*, DX's 17, 19, 29 (constituent letters

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[2] The videotape shows a scene in which a man performs oral sex on a woman. The video images, while partially scrambled, are discernible. The audio contains four-letter words and vulgar references to sexual organs. DX 1.

[3] The district court received other evidence of partially scrambled transmissions by Playboy and Spice. For example, Defendants' Exhibit 4 contains partially scrambled scenes videotaped from the Playboy Channel in Orange, California. Harris Decl., ¶ 5. The scenes depict "images of a nude woman caressing herself and then of two nude women in the water and in a boat, caressing each other." J.S. App. 12a. Defendants' Exhibit 5 is an audio tape of the Spice Channel in early 1994 in the Oxnard, California home of a non-Spice subscriber. Allen Decl., ¶ 5. The tape contains "the sounds of what appear to be repeated sexual encounters accompanied by assorted orgiastic moans and groans." J.S. App. 12a.

complaining about inadequately scrambled "sex channels" and their availability to children).[4]

In her floor statement, Senator Feinstein acknowledged that Congress could require cable operators to provide complete blocking of audio and video signals on request of a subscriber—an approach Congress ultimately adopted and included in Section 504 of the Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 136. But Senator Feinstein observed that that proposal did not "go[] far enough," insofar as it would "put the burden of action on the subscriber * * * by requiring a subscriber to specifically request the blocking of indecent programming." 141 Cong. Rec. S8167 (daily ed. June 12, 1995) (statement of Sen. Feinstein). She explained that Section 505, by mandating scrambling of both the audio and video portions of indecent programming on adult-oriented networks, would not require cable operators to do anything other than what the industry was already capable of and, in fact, was already doing in some communities. *Ibid.*

3. Section 505 became law on February 8, 1996, when the President signed the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. As enacted, Section 505 provides that, "[i]n providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedi-

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[4] The record in this case reflects the ease with which children have access to less than fully scrambled adult programming. Mr. Snesko's nephew, for example, knew how to disconnect a television set from the converter box in order to watch Spice, even though the boy's father did not even know that Spice could be received in the house. Snesko Decl., ¶ 3. In Rock Island, Illinois, junior high school children discovered that they could watch the Spice Channel after school long before the adult community became aware that Spice was not fully scrambled. Mahlo Decl., ¶¶ 4-6.

cated to sexually-oriented programming," an MSO "shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it." Until the MSO complies with those requirements, it "shall limit the access of children" to such programming "by not providing such programming during the hours of the day (as determined by the [Federal Communications] Commission) when a significant number of children are likely to view it." 110 Stat. 136.

On March 5, 1996, the Federal Communications Commission issued an interim rule for implementation of Section 505. Order and Notice of Proposed Rulemaking, *In re Implementation of Section 505 of the Telecommunications Act of 1996*, 11 F.C.C. Rcd. 5386 (1996) (*Implementation of Section 505*). First, the Commission interpreted the term "sexually explicit adult programming," as used in Section 505, to be a category of "programming that is indecent," a phrase also used in the statute. *Implementation of Section 505*, ¶¶ 6, 9. The Commission also construed Section 505 to require scrambling or time-channeling only of that programming on a network primarily dedicated to sexually-oriented programming which is itself indecent. See *Implementation of Section 505*, ¶ 6.

The Commission defined "'indecent' programming" on an interim basis to mean "any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable or [other multichannel video programming distribution] medium," and proposed to adopt that definition on a permanent basis. *Implementation of Section 505*, ¶¶ 9, 16. As the Commission explained, that is essentially the same definition adopted by the Commission, and repeatedly sustained by

the courts, for purposes of regulating indecent broadcast programs and telephone messages.

The Commission finally proposed, and provisionally adopted, a safe harbor for purposes of Section 505's time-channeling requirement of 10:00 p.m. to 6:00 a.m., the same safe harbor hours previously established for airing indecent broadcast television or radio programs. *Implmentation of Section 505*, ¶¶ 5, 8; see also 47 C.F.R. 73.3999.

4. Appellants provide "virtually 100% sexually explicit adult programming" (J.S. App. 8a) for transmission by cable operators to premium subscribers. Appellant Playboy provides such programming via its Playboy Television and AdulTVision networks, while appellant Spice Entertainment[5] provides the programming on its Adam & Eve and Spice networks.

On February 26, 1996, Playboy filed suit in district court seeking declaratory and injunctive relief against the operation of Section 505. The complaint alleged that Section 505 violated appellant's rights under the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. The district court consolidated the action with a similar action brought by Spice Entertainment, and on March 7 granted a temporary restraining order preventing Section 505 from going into effect on March 9. J.S. App. 4a-5a & n.7; see *Playboy Entertainment Group, Inc.* v. *United States*, 918 F. Supp. 813 (D. Del. 1996). A three-judge district court was then appointed under Section 561(a) of the Act. J.S. App. 3a-4a & n.6. Following discovery and briefing, the three-judge district court held a hearing on appellants' motion for a preliminary injunc-

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[5] The district court refers to appellant Spice Entertainment Companies by its former name, Graff Pay-Per-View, Inc.

tion. The court permitted supplemental briefing after this Court's decision in *Denver Area Educational Telecommunications Consortium* v. *FCC*, 116 S. Ct. 2374 (1996). J.S. App. 5a.

5. On November 8, 1996, the court issued a decision denying appellants' motion for a preliminary injunction against implementation and enforcement of Section 505. The court recognized that issuing a preliminary injunction against "a law drafted and adopted by a co-equal branch of government" invokes "one of the judiciary's most 'awesome responsibilit[ies] calling for the utmost circumspection in its exercise.'" J.S. App. 20a (quoting *Heart of Atlanta Motel, Inc.* v. *United States*, 85 S. Ct. 1, 2 (1964) (Black, J., in chambers)). The court concluded that "at this preliminary injunction stage, * * * [appellants] ha[d] not met the requirements for the issuing of a preliminary injunction." J.S. App. 20a. In particular, the court noted that appellants had failed to show "that they are likely to prevail on the merits if [their] claims are ultimately litigated" and failed to "demonstrate that the public interest is served by permitting signal bleed to invade nonsubscribers' homes, particularly in view of our interest in protecting children from a pervasive medium which transmits sexually explicit sounds and images." *Id.* at 22a.

a. The court held, under *Denver Area*, that appellants' First Amendment claim had to be reviewed under "strict scrutiny or something very close to strict scrutiny" as a content-based restriction on speech. J.S. App. 25a. Even though Section 505 is "aimed at the content-neutral objective of preventing signal bleed," the court analyzed it as a content-based restriction because it applies "only when signal bleed occurs during the transmission of 'sexually explicit adult programming or other programming that is indecent.'" J.S. App. 27a.

The court found that Section 505 addresses a compelling interest in "protect[ing] children from sexually explicit material, particularly in the context of a pervasive medium" such as cable television. J.S. App. 27a. The court noted that in *Denver Area*, a plurality of this Court had found that cable television, like the radio broadcast system in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), is "uniquely pervasive" and that it is "as 'accessible to children' as over-the-air broadcasting if not more so." J.S. App. 30a (quoting *Denver Area*, 116 S. Ct. at 2386). Because of imperfect signal scrambling, millions of children "have potential access not only to indecent sounds, * * * but also to sexually explicit visual images," even in those households that "do not subscribe to sex-dedicated networks." J.S. App. 31a.

The court also held that Section 505 is carefully tailored to further the compelling interest in protecting children. The court explained that Section 505 "does not seek to ban sexually explicit programming, nor does it prohibit consenting adults from viewing erotic material on premium cable networks if they so desire." J.S. App. 34a. Instead, Section 505 gives cable operators two alternative means of compliance—complete scrambling of audio and video or time-channeling. Although the court recognized that there would be a "substantial expense" involved in completely scrambling the audio and video, it noted that "§ 505 does *not* require that [cable operators] shoulder potentially fatal economic burdens." *Id.* at 32a-33a. Moreover, the court held that the economic burden imposed by the complete scrambling requirement is mitigated "in light of the substantially less expensive option provided by time-channeling," *id.* at 33a, which the Supreme Court in *Pacifica* had held to be constitutional in analogous circumstances. *Ibid.*

The court also rejected the claim that Section 504 is a less restrictive alternative that would accomplish the same end. Section 504 requires cable operators, on subscriber request, to scramble fully or otherwise fully block audio and video transmission of *any* channel, without charge. But under Section 504, the subscriber must learn of the problems caused by signal bleed and of the availability of complete scrambling on request, and the subscriber must then take the initiative in making the request of the cable operator. J.S. App. 35a. The court found that the evidence, at this stage of the case, did not show that Section 504 was "a viable alternative." *Ibid.* The court noted that "many parents are unaware of the problem of sexually explicit signal bleed and its accessibility to children." *Id.* at 35a n.28. The court also explained that, even insofar as parents are aware of the problem, "there is no evidence that parents are * * * aware of the § 504 means of achieving complete blocking of undesired channels." *Id.* at 35a. The court added that "children watch television in the homes of their friends as well as in their own homes," and that Congress reasonably wished "to extend protection from signal bleed beyond a child's own home." *Ibid.*

b. The court also held that plaintiffs are unlikely to succeed on the merits with respect to their equal protection claim. The court noted that Section 505 treats sex-dedicated networks differently from other premium networks, which occasionally showed sexually explicit scenes in their programming. The court noted, however, that sex-dedicated networks such as those operated by appellants transmit sexually explicit adult programming 24 hours a day. By contrast, the court referred to evidence that sexually explicit programming constitutes "only a fraction of the programming"—in one cited instance, substantially less than one-sixteenth—on ordinary

premium channels. J.S. App. 37a. The court explained that Congress's distinction is justified because "signal bleed from that one-sixteenth * * * would not continuously present sexually explicit scenes to the channel surfer." *Ibid.*

c. Finally, the court held that Section 505 is not unconstitutionally vague. The use of accepted terms such as "indecent" give the statute sufficiently clear meaning. J.S. App. 39a-40a.

6. Appellants filed notices of appeal (96-1034 J.S. App. 42a; 96-1108 J.S. App. 1a), and moved for an injunction pending appeal. On November 15, 1996, the district court stayed enforcement of Section 505 pending disposition of appellants' motions. On December 5, 1996, the district court granted a stay of enforcement pending appeal. Section 505 of the Act has thus not yet been permitted to go into effect.

ARGUMENT

The district court refused to preliminarily enjoin the implementation and enforcement of an Act of Congress, holding that appellants had failed to satisfy the prerequisites for such relief at this stage of the litigation. That decision, which is subject only to narrow appellate review for abuse of discretion, should be summarily affirmed. In light of the weighty presumption of constitutionality that accompanies an Act of Congress, a district court's refusal to enjoin a statute's implementation at an early stage of litigation and before the parties have had opportunity for a full factual and legal presentation could constitute error only in the most exceptional circumstances. Indeed, the district court's opinion in this case specifically refers to issues that remain to be resolved in further proceedings, thus rendering the case particularly unsuitable for plenary review at this time. Moreover, the district

court's determination that appellants are unlikely to succeed on the merits follows settled First Amendment doctrine, set forth in decisions of this Court up to and including this Court's recent decision in *Denver Area*. Accordingly, this is plainly not the rare case in which an Act of Congress is so patently unconstitutional that a district court could be viewed as having abused its discretion by refusing to enjoin its implementation during the pendency of litigation.

1. This Court has frequently reaffirmed the "well-established doctrine that an application for an interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised." *Alabama* v. *United States*, 279 U.S. 229, 230-231 (1929). Accord *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R.R.*, 363 U.S. 528, 535 (1960) ("The balancing of * * * competing claims of irreparable hardship is, however, the traditional function of the equity court, the exercise of which is reviewable only for abuse of discretion."); *Yakus* v. *United States*, 321 U.S. 414, 440-441 (1944) ("award of an interlocutory injunction * * * has never been regarded as strictly a matter of right"); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 331 (1944); *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 290 (1940); *Prendergast* v. *New York Tel. Co.*, 262 U.S. 43, 50-51 (1923); *Synanon Found., Inc.* v. *California*, 444 U.S. 1307 (1979) (Rehnquist, J., in chambers).

In this case, the district court exercised its discretion to refuse to grant a preliminary injunction against implementation and enforcement of an Act of Congress. Such a decision would constitute an abuse of discretion only in the most exceptional circumstances. "[J]udicial power to stay an act of Congress, like judicial power to

hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise." *Heart of Atlanta Motel, Inc.* v. *United States*, 85 S. Ct. 1, 2 (1964) (Black, J., in chambers). Acts of Congress are presumptively constitutional, *United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985), and should not be invalidated except "for the most compelling constitutional reasons." *Mistretta* v. *United States*, 488 U.S. 361, 384 (1989) (internal quotations omitted). Absent such a showing, the challenged statute "should remain in effect pending a final decision on the merits by [the courts]." *Turner Broadcasting Sys., Inc.* v. *FCC*, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in chambers). Accord *Bowen* v. *Kendrick*, 483 U.S. 1304 (1987) (Rehnquist, C.J., in chambers).

Those principles apply no less in First Amendment cases than in others. Where the constitutionality of an Act of Congress is not at issue, the possibility of an injury to a party's First Amendment rights may justify issuance of a preliminary injunction under some circumstances. But when a party seeks to enjoin implementation and enforcement of an Act of Congress, the balance of equities shifts significantly against invalidating the Act on a preliminary basis—and based on an incomplete record—during the pendency of litigation.

For example, *Turner Broadcasting* involved a First Amendment challenge to provisions of the 1992 Cable Act, which require cable operators to set aside a portion of their channel capacity for carriage of local broadcast stations. Plaintiffs sought, and were denied, an injunction against enforcement of these "must carry" provisions pending this Court's review. 507 U.S. at 1302. Indeed, the must-carry requirements remain in effect even though this Court vacated the lower court's judgment

upholding their constitutionality, remanded the case for further proceedings, see *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622 (1994), and has accepted the case again for additional review. *Turner Broadcasting Sys., Inc.* v. *FCC*, No. 95-992 (argued Oct. 7, 1996).[6]

The district court's determination not to invalidate Section 505 during the pendency of litigation was particularly appropriate in light of the state of the record in this case. For example, one of appellants' key arguments is that the availability of consumer-initiated channel-by-channel blocking under Section 504 is sufficient to render Section 505 a more restrictive—and hence, in their view, unconstitutional—alternative. See 96-1034 J.S. 19-20, 20-21; 96-1108 J.S. 20-22. Substantial evidence was introduced, however, that Section 504 is not a viable alternative to Section 505.[7] The district court noted that appellants failed to produce contrary evidence that "MSOs are

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[6] See also *Daniels Cablevision, Inc.* v. *FCC*, 835 F. Supp. 1, 10-12 (D.D.C. 1993), aff'd in part *sub nom.*, *Time Warner Entertainment Co.* v. *FCC*, 93 F.3d 957 (D.C. Cir. 1996) (holding three provisions of the 1992 Cable Act unconstitutional, but nevertheless declining to enjoin their enforcement pending appeal).

[7] For example, complete blocking on request through the use of "lockboxes" has been available by law since at least 1984, when Congress enacted 47 U.S.C. 544(d)(2). The primary relevant difference between that provision and Section 504 is that under prior law the cable operator could charge customers for the lockbox. Yet the record in this case demonstrates that, notwithstanding the availability of lockboxes and the fact that there is no evidence that anyone affirmatively desires signal bleed, see J.S. App. 13a, appellants' networks are "bleeding" into millions of cable households that do not subscribe to their programming. That constitutes significant evidence that complete blocking on request is ineffective to protect children from signal bleed. Cf. *Denver Area*, 116 S. Ct. at 2393. In addition, signal bleed poses further problems because children view television not only in their own homes, but also in the homes of their friends. J.S. App. 11a-12a.

advising cable customers of the availability" of the Section 504 process or that "customers are responding to such notices, if given." J.S. App. 17a.[8] But the court also noted that "[a]t the time of the permanent injunction hearing, further evidence of the actual and predicted impact and efficacy of § 504 would be helpful to us." *Ibid.* See also *id.* at 13a n.13 (noting need for "more specific evidence of the number of households with the potential for signal bleed" before decision on permanent injunction); *id.* at 19a n.19 (expressing "skepti[cism]" regarding appellants' "estimate of revenue loss"); *id.* at 29a n.25 (noting need for "additional evidence demonstrating the effects of sexually explicit materials on children" before decision on permanent injunction). With potential factual uncertainties of that sort still remaining, the district court properly declined to enjoin Section 505.

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[8] Appellants err in arguing (96-1034 J.S. 20-21; 96-1108 J.S. 21-22) that the district court incorrectly shifted the burden of proof on whether Section 504 would be a less restrictive alternative. Initially, appellants' argument appears to rest on the incorrect premise that in a preliminary injunction proceeding where parties seek to enjoin an Act of Congress, the government must conclusively prove its case in favor of constitutionality in full before the court may reject the request for an injunction. See, *e.g.*, 96-1108 J.S. 22 n 19. In any event, the government in this case introduced substantial evidence, accepted by the district court, that the "lockbox" alternative provided by the 1992 Cable Act and its close cousin, the Section 504 complete-blocking-on-request option, had not been effective to resolve the problem and are therefore unlikely to be effective in the future. See note 7, *supra*. When the district court stated that there was not enough evidence to let the court "effectively assess plaintiffs' claim that § 504 is likely to become a viable remedy for eliminating signal bleed," J.S. 20 (quoting J.S. App. 17a), it was simply pointing out that appellants had failed to rebut the government's case and were, on the present record, therefore not likely to succeed on the merits.

2. The district court's determination that appellants are unlikely to succeed on the merits represents a straightforward application of settled precedent from this Court, recently reaffirmed in *Denver Area*.

a. Section 505 is constitutional for the same reasons that this Court found Section 10(a) of the statute before the Court in *Denver Area* constitutional. Section 10(a) authorizes cable operators to ban indecent programming that would otherwise be broadcast on leased access channels. The justification for Section 505 is the same interest that the plurality in *Denver Area* found justifies Section 10(a): "[t]he need to protect children from exposure to patently offensive sex-related material," which "this Court has often found compelling." 116 S. Ct. at 2386.

Moreover, as in *Denver Area*, the problem addressed by Section 10(a)—the need to protect children from indecent material on television—is "remarkably similar" to the problem that this Court had previously addressed in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), and Congress's solution is also "commensurate with the balance [the Court] approved [in *Pacifica*]." 116 S. Ct. at 2386. In *Pacifica*, the Court upheld a requirement that radio broadcasters limit indecent language to times of the day when children are unlikely to be in the audience. A broadcaster may comply with Section 505 by similarly limiting indecent visual or audio material on appellants' networks to the same times of day. See also *Denver Area*, 116 S. Ct. at 2387 (noting that the fact that Section 10(a) grants operators "flexibility" to "rearrange broadcast time" to "lessen[] the risks of harm to children" supports its constitutionality). Indeed, Section 505 is substantially less restrictive than the requirement at issue in *Pacifica*. While the broadcaster in *Pacifica* was offered *only* the option of time channeling the indecent programming,

Section 505 also offers the option of complete blocking to eliminate signal bleed.

The plurality in *Denver Area* also referred to "the permissive nature of § 10(a)" as supporting its constitutionality. 116 S. Ct. at 2387. The plurality explained that "although the provision does create a risk that a program will not appear, that risk is not the same as the certainty that accompanies a governmental ban." *Ibid.* The plurality recognized that under Section 10(a) the cable operator could choose to "ban" the indecent programming altogether, "in light of comparative audience demand and a host of other practical factors." *Ibid.* Yet despite that "uncertainty as to practical consequences," *ibid.*, the Court held Section 10(a) to be constitutional.

In this case, the requirements imposed by Section 505 also do not amount to an outright "governmental ban." As noted above, cable operators may comply with Section 505 by time channeling appellants' programming to the FCC's "safe harbor"—the same safe harbor found constitutionally acceptable in *Pacifica*. As the district court held (J.S. App. 33a-34a), the availability of that option is sufficient to justify Section 505.

In addition, the district court's findings reflect that completely blocking the audio and video signal to preclude signal bleed is also a viable option. The district court relied on the evidence of an officer of appellant Spice, who "testified that roughly half of the systems carrying [Spice] programming are in compliance with § 505." J.S. App. 15a. Those systems either use modern baseband technology that fully scrambles both video and audio signals, see *id.* at 9a n.12, or they "have already adopted 'double scrambling'" to eliminate "audio and/or video bleeding," *id.* at 19a. Moreover, many households have "convertor boxes [that] will map out [appellants'] channels and as a consequence these households will not

receive 'signal bleed.'" *id.* at 12a. Finally, digital cable television, a technology now being adopted by cable systems, "will prevent all audio and video bleeding." *Id.* at 15a.

Thus, some cable systems already have eliminated the problem of signal bleed without time channeling. In light of the large number of households that are already effectively in compliance and the trend toward digital television, other cable operators are likely to be able to do so as well. Accordingly, by offering the option of eliminating signal bleed while continuing 24-hour-a-day programming, Section 505 protects children from indecent materials in a way that is less restrictive than that which this Court found constitutional in *Denver Area* and *Pacifica*.

b. Section 505 does not suffer from the defects that led this Court in *Denver Area* to find two other statutory provisions unconstitutional. The Court in *Denver Area* held that Section 10(b)—the provision requiring cable operators to segregate indecent leased access programming on separate channels available to subscribers only on request—had a number of features that, cumulatively, rendered the statute unconstitutional. None of them are applicable to Section 505.

Section 10(b) permitted a delay of up to 30 days before a cable operator had to respond to a subscriber's request for access to (or reblocking of) an "indecent" channel. It also required viewers to request access to the segregated, "indecent" channel in writing, thus deterring viewers concerned about maintaining their privacy. By contrast, the Court specifically cited Section 505, among other provisions, as "significantly less restrictive than [Section 10(b)]." 116 S. Ct. at 2392.[9] It does not "force the viewer

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[9] A majority of the Court joined in the portion of the opinion addressing Section 10(b).

to receive (for days or weeks at a time) all 'patently offensive' programming or none." *Ibid.* Nor does it "automatically place the occasional viewer's name on a special list," *ibid.*; as the district court noted, "with sexually explicit premium and pay-per-view programming, the subscriber will * * * be identifiable through billing for the programming," regardless of whether Section 505 is implemented. J.S. App. 19a. In short, although Section 10(b) in *Denver Area* was not "a narrowly, or reasonably, tailored effort to protect children," 116 S. Ct. at 2394, Section 505 "strikes a permissible balance of constitutional interests." J.S. App. 34a.[10]

The Court in *Denver Area* also held Section 10(c) of the 1992 Act unconstitutional. That provision applied to public, educational, and governmental (PEG) access channels, as opposed to the commercial leased access channels to which Sections 10(a) and 10(b) applied. Section 10(c) provided that cable operators could refuse to

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[10] Appellant Spice Entertainment's claim (96-1108 J.S. 2) that Section 505 "interferes even more substantially" with speech than Section 10(b) is wrong. Aside from the distinctions cited in text, Section 10(b) attempted to regulate quite directly the communications between the programmer and its intended audience; the statute provided that such communications could take place only on segregated channels to which indecent programming would be confined and that had been specifically requested, in writing, by each viewer. Although a casual viewer may desire the programming and the programmer may want to reach that viewer, Section 10(b) would have precluded the communication from occurring absent the segregation on a separate channel and the viewer's written request. Section 505, by contrast, is not aimed at the communication between the programmer and the intended viewer, and it imposes no mandatory requirements on such communication. Instead, it provides that steps must be taken to avoid communication between the programmer and individuals whom the programmer is trying *not* to reach and who have no interest in receiving the programming (because they have not subscribed to it).

show indecent material on PEG channels. As the plurality explained, Section 10(c) was unconstitutional primarily because there was no showing that there was a legitimate need for giving cable operators that kind of veto power over PEG programming. The plurality noted that, under the pre-1992 Act regime, each community already had "a locally accountable body capable of addressing the problem, should it arise, of patently offensive programming broadcast to children, making it unlikely that many children will in fact be exposed to programming considered patently offensive in that community." 116 S. Ct. at 2395.[11] By contrast, the district court in this case found that "[t]here is no question that * * * millions of children * * * have potential access not only to indecent sounds, * * * but also to sexually explicit visual images." J.S. App. 31a. And, as the district court stated, "[u]pon this record, the government has demonstrated that § 504 will not be a viable alternative" to address that problem. *Id.* at 35a. See also *id.* at 17a (granting appellants the opportunity, "[a]t the time of the permanent injunction hearing," to present "further evidence of the actual and predicted impact and efficacy of § 504"). Accordingly, Section 505 does not suffer from the defect that rendered Section 10(c) unconstitutional in *Denver Area*.

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[11] See also 116 S. Ct. at 2395-2396 ("the public/nonprofit programming control systems now in place would normally avoid, minimize, or eliminate any child-related problems concerning 'patently offensive' programming"); *id.* at 2396 (finding no "significant nationwide pattern" of indecent programming accessible to children on PEG channels); *id.* at 2397 ("In the absence of a factual basis substantiating the harm and the efficacy of [Section 10(c)], we cannot assume that the harm exists or that the regulation redresses it."); *ibid.* ("given present supervisory mechanisms, the need for [Section 10(c)], aimed directly at public access channels, is not obvious").

3. Appellants argue (96-1034 J.S. 13; 96-1108 J.S. 14-15) that eliminating signal bleed from appellants' programming under Section 505 would require cable operators to incur significant additional costs; that the operators will choose to avoid those costs by adopting the time channeling alternative instead; and that that is sufficient to demonstrate that Section 505 is unconstitutional.

The district court did find that there is "a substantial expense involved in complying with [Section 505]." J.S. App. 32a. As the court recognized, however, "economics alone cannot dictate the result where constitutional rights are at issue." *Ibid.* The extra costs involved are the result of the "indirect effects" of signal bleed on individuals who are not part of their audience, who do not want their programming, and with whom they have no interest in communicating. See *id.* at 2a-3a ("[appellants] do not contend that signal bleed itself is protected speech"); *id.* at 13a ("No evidence was presented of any consumer desire to receive 'signal bleed.'"). This Court has consistently held that a speaker may be forced to bear such indirect costs of its programming. See, *e.g.*, *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 53-54 (1986); *Young* v. *American Mini Theaters, Inc.*, 427 U.S. 50, 78 (1976) (Powell, J., concurring). And in *Denver Area*, the Court pointedly noted that an acceptable mode of dealing with the problem of children's access to patently offensive sexually explicit programming is to "impos[e] cost burdens upon system operators (who may spread them through subscription fees)." 116 S. Ct. at 2393. In Section 505, that is exactly what Congress did (although it mitigated the burden of those costs by adding the additional option of time channeling).

Even if the precise costs of compliance with Section 505 were of significance, that amount is open to substan-

tial doubt on this record. The district court found reasons to be "skeptical of [appellants'] estimate of revenue loss," J.S. App. 19a n.19, indicating that it would be inappropriate to base a preliminary injunction on inflated and unproven claims of dire economic consequences.[12] Moreover, for the reasons given above, see pp. 18-19, compliance with Section 505's complete blocking requirement is a viable option. And Section 505 also contains the time-channeling safe harbor, a restriction upheld in *Pacifica* in a context in which it was the *only* option available. In permitting an additional option which is technology feasible here, the government is not required to subsidize that option. Here, the district court correctly concluded that "§ 505 does *not* require that MSOs shoulder potentially fatal economic burdens." J.S. App. 32a-33a.[13]

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[12] Appellant Playboy asserts that the district court "found as a factual matter that Section 505(a) would 'undoubtedly' impose 'substantial expense' upon cable operators and 'potentially fatal economic burdens,' including the 'possibility of bankruptcy' of the targeted networks." 96-1034 J.S. 13. That assertion is inaccurate. The district court did state that there is "undoubtedly a substantial expense involved in complying with subsection (a) [full scrambling]," J.S. App. 32a, but the other two quoted phrases are the court's statement of *appellants'* position. Thus, the court stated: "Not only do [appellants] foresee lost profits, they present the possibility of bankruptcy caused by implementation of § 505." *Ibid.* (emphasis added). The court itself, by contrast, expressed skepticism about appellants' estimates of economic injury, *id.* at 19a, and found that such injury would *not* be "potentially fatal." *Id.* at 33a.

[13] Even if the time channeling safe harbor is used, Section 505 leaves open ample means for adults to view indecent programming when it is broadcast or they "may * * * use a VCR to tape adult programming during the safe harbor hours." J.S. App. 20a n.6. Although appellant Spice argues that time-shifting through use of a VCR is not an adequate alternative, 97-1108 J.S. 8-9, the district court noted that Spice's Vice President testified "that a 10:00 p.m. starting

4. Appellants argue (96-1034 J.S. 22-25; 96-1108 J.S. 24-29) that Section 505 violates their right to equal protection of the laws. Appellants assert that Congress could not legitimately distinguish between continuous indecent programming, such as that on appellants' networks, and the occasional sexually explicit programming on other premium cable networks. That argument is mistaken.

In *Denver Area*, the Court "recognize[d] * * * that Congress need not deal with every problem at once." 116 S. Ct. at 2393. See also *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993) (Court does "not require that the Government make progress on every front before it can make progress on any front"). The district court in this case determined that sex-dedicated networks such as those run by appellants pose a unique threat that justifies distinct legal treatment. For example, the court referred to evidence showing that "the number of sexually explicit programs available on non-adult channels * * * was one sixteenth that shown on the [appellants'] adult channels." J.S. App. 8a. Further, the court noted, even that figure substantially overstates the indecent programming on the non-adult channels. The non-adult channels show "mainly 'R' rated movies which contained some sexually explicit scenes but were not continuously sexually explicit." *Ibid.* By contrast, appellants' programming is "continuously sexually explicit," *ibid.*; they provide "nothing but

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time would cause no loss of revenue" because "people may rearrange their viewing schedule or use a VCR to tape adult programming during the safe harbor hours." J.S. App. 20a n.19. Section 505 also leaves adults entirely free to obtain indecent programming by "purchas[ing] tapes and records or go[ing] to theaters and nightclubs" where indecent programming is available. *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 750 & n.28 (1978).

sexually explicit programming intended for adult audiences," *id.* at 37a-38a.

In light of those findings, Congress's determination to address the problems caused by appellants' networks is unassailable. A child innocently flipping the channels of a cable television would be very *un*likely to view or hear sexually explicit signal bleed from ordinary, non-adult premium channels. The same child, however, could not help but view or hear sexually explicit materials—such as "scrambled images of * * * two nude women in the water and in a boat, caressing each other" or "the sounds of what appear to be repeated sexual encounters accompanied by assorted orgiastic moans and groans," J.S. App. 12a—if the child advertently or inadvertently turned to signal bleed from appellants' networks. As the district court explained, "[t]he cause of the problem was primarily traced to sex-dedicated networks and, understandably, Congress began its efforts to address the problem by focusing on those networks." *Id.* at 38a.

5. Appellant Playboy claims (96-1034 J.S. 25-29) that Section 505 is unconstitutionally vague. See also 96-1108 J.S. 29 n.30. Section 505 applies to "sexually explicit adult programming or other programming that is indecent on any channel * * * primarily dedicated to sexually-oriented programming." This Court has repeatedly upheld similar definitions against vagueness challenges.[14] The district court's determination, at this stage of the litigation, that appellant Playboy is unlikely to succeed on its vagueness challenge was accordingly correct.

The FCC has interpreted the key terms in Section 505. It interpreted the term "sexually explicit adult programming" to be a category of "programming that is

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[14] Lower federal courts have also rejected vagueness challenges in similar circumstances. See 96-1034 J.S. 26 n.30 (citing cases).

indecent," a term that follows it in the statute. *Implementation of Section 505*, ¶¶ 6, 9. The Commission also construed Section 505 to require scrambling or time-channeling only of programming that is itself indecent and that is broadcast on a network primarily dedicated to sexually-oriented programming. See *Implementation of Section 505*, ¶ 6. The Commission defined "'indecent' programming" on an interim basis to mean "any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable * * * medium," and it proposed to adopt that definition on a permanent basis. *Implementation of Section 505*, ¶¶ 6, 9.

The FCC has thus defined the key statutory terms in terms of "indecent programming," and it has defined "indecent programming" in terms of "patently offensive" depictions of "sexual or excretory activities or organs." That definition is similar to the second element in the definition of obscenity in *Miller* v. *California*, 413 U.S. 15, 24 (1973) ("depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"). The Court in *Miller* upheld that formulation against a vagueness challenge. *Id.* at 27 & n.10. See also *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 57-58 & n.6 (1989) (rejecting vagueness challenge to statute that defined obscene conduct as conduct that, *inter alia*, "depicts or describes, in a patently offensive way, sexual conduct"). The definition is also similar to the statute at issue in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), which criminalized sale to minors of obscene pictures that were, *inter alia*, "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors." *Id.* at 633.

The Court in *Ginsberg* rejected a vagueness challenge to that statute. *Id.* at 643-645.

In *Denver Area*, a four-Justice plurality of the Court expressly rejected a vagueness challenge to a provision giving cable operators a right to prohibit programming on leased channels "that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 116 S. Ct. at 2381, 2389-2390. Three additional Justices voted to uphold the constitutionality of that provision, thereby implicitly rejecting the vagueness challenge. *Id.* at 2419 (opinion of Thomas, J., concurring in part and dissenting in part).

Appellant Playboy concedes that its network is covered by Section 505, but it argues that the statute is vague because "it is unknown what *other* networks might be affected." 96-1034 J.S. 27 (emphasis added).[15] That argument fails, however, because a party to whom an allegedly vague statute applies has no standing to complain of its vagueness with regard to others. *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute

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[15] Appellant Playboy (96-1034 J.S. 28) refers to Section 506 of the 1996 Act, which appellant states "added 'nudity' to the list of proscribable 'indecent' programming on public and leased access channels." Section 506, however, amends the statute upheld in *Denver Area* and applies *only* to public and leased access channels. It does *not* apply to channels covered by Section 505, *i.e.*, "any channel * * * primarily dedicated to sexually-oriented programming." Accordingly, the term "nudity" in Section 506 has no application to appellants' programming and it has no bearing on the constitutionality of Section 505. See also Order and Notice of Proposed Rulemaking, *In re Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, FCC 96-154, CS Docket No. 96-85, ¶ 111 (1996) ("tentatively conclud[ing] that the term 'nudity' as used in Section 506(a) and (b) of the 1996 Act should be interpreted to mean nudity that is obscene or indecent").

clearly applies may not successfully challenge it for vagueness."); see *American Mini Theatres*, 427 U.S. at 58-59.

The Constitution requires the government to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). Perfect clarity, however, is neither possible nor constitutionally required, *id.* at 110, particularly in a statute like Section 505 that imposes a civil regulatory requirement on commercial entities, rather than a criminal prohibition. See, *e.g.*, *Kolender* v. *Lawson*, 461 U.S. 352, 359 n.8, 361 (1983); *Winters* v. *New York*, 333 U.S. 507, 515 (1948) ("The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement.").[16] In light of their history and authoritative interpretation by the FCC, the terms "patently offensive" and "sexual or excretory activities or organs" give fair warning concerning what types of depictions and communications are and are not prohibited by Section 505. If the legislature is to be permitted to protect children by regulating the broadcast of patently offensive communications, no greater precision can be expected or required.

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[16] Under 47 U.S.C. 501, anyone "who willfully and knowingly does * * * any act" that is "prohibited or declared to be unlawful" by the Communications Act of 1934, which includes Section 505, is subject to criminal prosecution. The various provisions of the Communications Act relating to indecency, however, have always been enforced through use of the FCC's civil remedial authority, not through the criminal law. Section 505 is therefore appropriately treated as a civil statute in analyzing the vagueness issue, particularly in the context of this pre-enforcement facial challenge to its validity.

CONCLUSION

The order of the district court denying a preliminary injunction should be affirmed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
STEPHEN W. PRESTON
Deputy Assistant Attorney General
JAMES A. FELDMAN
Assistant to the Solicitor General
BARBARA L. HERWIG
EDWARD HIMMELFARB
Attorneys

WILLIAM E. KENNARD
General Counsel
CHRISTOPHER J. WRIGHT
Deputy General Counsel
Federal Communications Commission

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